

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
CHANGE OF APPROPRIATION WATER RIGHT
NO. 8772-c41QJ BY JOHN E. PALO

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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the courtroom of the Cascade County Courthouse at Great Falls, Montana, on Friday, March 4, 1977, Gary L. Spaeth, Legal Counsel and Hearing Examiner for the Department of Natural Resources and Conservation, presiding.

Mr. John E. Palo, the Applicant herein, appeared personally and presented evidence and testimony in support of his application. The Applicant was represented by counsel, Mr. Donald J. Hamilton of the firm of Jardine, Stephenson, Blewett and Weaver of Great Falls, Montana.

There were two objections filed to the above application by Mr. and Mrs. Harry Wiegand of Sun River, Montana, and Mr. Bradley Hamlett, President of Hamlett Ranch Company. Mr. Hamlett was represented by counsel, Mr. James W. Zion, of Helena, Montana.

Mr. Robert Peter and Mr. Silvio Rodriguez attended the hearing on behalf of the Department of Natural Resources and Conservation.

A Proposed Order (Proposal for Decision) and attached Memorandum, dated November 22, 1977, was issued by the Hearing Examiner, Gary L. Spaeth.

The Proposed Order Notice as issued on November 22, 1977 provided that the Proposed Order would not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, and that written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days of service upon the parties herein. Upon receipt

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of any written exceptions, opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

On December 9, 1977 the Department received a letter from Philip Johnson on behalf of John Palo requesting that the application be modified as follows: "In place of the 435 acre-feet per annum to the reduced figure of 216 acre-feet. Also the proposed 942.9 gallons per minute would be reduced to 500 gallons per minute with a flow rate reduction from 2.1 to 1.25 cfs. with the difference between the 435 acre-feet per annum and the modified amount, 216 acre-feet per annum remaining at the original point of diversion. Also I would like to change the amount of land which is proposed to be irrigated from 180 acres located in NW $\frac{1}{4}$, and N $\frac{1}{2}$ S $\frac{1}{2}$ of Section 17, T. 19 N., R. 1 W. to read 90 acres more or less in W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17, T. 19 N., R. 1 W. Due to further water test taken after the hearing held in Great Falls, indicated that the salt content was to high to justify investing a large amount of money in irrigating the proposed ground. Without using a large amount of Sun River water for leaching. However at certain times of the year Muddy Creek water is suitable for sprinkler irrigation and possibly could be used an entire season if the creek ran sufficient."

On December 13, 1977 the Department received an "Exception to Proposed Order", dated December 9, 1977 from James W. Zion, attorney for the Objector Hamlett Ranch Company, filed in opposition to the Proposed Order as issued by the Hearing Examiner on November 22, 1977 in the matter of Application No. 8772-c41QJ by John E. Palo.

The Department by letter of December 14, 1977 to Mr. Zion, with copies to Messrs. Palo, Johnson, Hamilton and Hamlett, acknowledged receipt of his Exception and advised him of his opportunity to file a Brief in support of the Exception within fifteen (15) days after receipt of the Department's letter. Mr. Zion was also informed of Mr. Johnson's letter of December 9, 1977 requesting a modification of the application. Mr. Zion was requested to respond to the Applicant's letter of December 9, and also to indicate if he wished to request an oral argument

hearing on the exception before the Water Resources Division Administrator.

On January 3, 1977 the Department received a letter dated December 30, 1977 from Mr. Zion in reply to the Department's letter of December 14, 1977. Mr. Zion stated in part as follows: "I am submitting this letter in lieu of a brief in this matter because the objector's briefs dated March 24th and April 6th, 1977 are extensive and adequately address the issues in the case. I ask that those briefs be reviewed. After discussion of this matter with my client, oral argument before the division administrator is hereby waived." In reference to Mr. Johnson's letter of December 9, 1977, Mr. Zion stated, "I therefore demand that I be furnished with a copy of the test referred to and reserve my right to demand a new hearing on the basis of the new evidence. Alternatively, I renew the objection of the Hamlett Ranch Company to the proposed permit on the grounds raised in the exceptions to proposed order dated December 9, 1977."

The Administrator of the Water Resources Division reviewed Mr. Zion's letter of December 30, 1977 and the application record, and therefore issued a Notice to Remand, dated January 30, 1978 which stated as follows:

"This is to advise that after intensive review of this matter, I hereby remand only specific issues necessitating further consideration as outlined below to Gary L. Spaeth, Hearing Examiner for this application. It is hereby ordered that the letter of December 9, 1977 as signed by Philip Johnson for John Palo the Applicant, and the December 30, 1977 letter of James W. Zion filed on behalf of his client, the objector Hamlett Ranch Co. are remanded to the Hearing Examiner for further consideration of possible new evidence raised by the two letters. The Hearing Examiner may at his discretion re-open the hearing, and may submit an Amended Proposal for Decision only as to the remanded issues."

The Hearing Examiner, Gary L. Spaeth, issued an Order dated February 3, 1978 ordering that the Applicant submit to Mr. Zion the new information or a summary of the new information which was discussed in the Applicant's letter of December 9, 1977; that Mr. Zion would have ten days from receipt of such information to request further relief from the hearing examiner and if the requested relief sought is the reconvening of the hearing, such request shall so state the reasons; that the Applicant would have five days to respond to the requests of Mr. Zion; and if a reconvening of the hearing is requested and such request is granted that it tentatively be scheduled for February 27, 1978.

On February 22, 1978 the Department received an Objection dated February 21, 1978 from Mr. Zion which stated:

"The objector hereby objects to the information supplied by Philip E. Johnson for John E. Palo, a copy of which is appended hereto and states: The information supplied is merely a restatement of the letter of December 9, 1977 and does not provide the objectors with any concrete information with regard to the salinity of the water."

Mr. Spaeth, the Hearing Examiner, sent a letter dated March 13, 1978 to Messrs. Hamilton and Zion attorneys for the Applicant and Objectors stating in part, "If you are unable to resolve this, I have tentatively set a pre-hearing conference in my office on Thursday, March 23, 1978 at 10:00 a.m. If we still are unable to resolve this at that time, I would like to schedule a hearing in this matter on March 31, 1978 at 10:00 a.m. in Great Falls. Let me know if you can resolve this and if not, as to whether the above schedule is satisfactory."

On March 27, 1978 the Department received a letter from Mr. Zion dated March 24, 1978 in reply to Mr. Spaeth's letter of March 13, 1978 which stated as follows: "This will confirm the conclusions reached following the prehearing conference held in your office on March 23, 1978. Present at the conference

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were you, Philip E. Johnson, and myself. Mr. Johnson provided information regarding the salinity of waters of the Little Muddy Creek and those coming from the Fort Shaw Canal. It is my understanding that the water is generally high in saline particles but that the primary problem with the use of the water is not increased salinity in water runoff, but that of harm to the land upon which the water is used. I agree with the suggestion that if a permit is issued that it be issued subject to the restrictions of the time of year in which leeching can be performed. I leave the details as to the precise restrictions to the department. As a result of the pre-hearing conference, I hereby waive any further hearings and leave the issues raised on appeal prior to this time for decision."

On April 4, 1978, the Hearing Examiner issued an Amended Proposal for Decision in the matter of Application No. 8772-c41QJ by John E. Palo.

The Amended Proposed Order Notice as issued on April 4, 1978 provided that the Proposed Order would not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation, and that written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days after receipt of service of the Proposal for Decision upon parties herein. No extensions of time for filing exceptions would be granted. Upon receipt of any written exceptions, opportunity would be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

It is a matter of record that Mr. Zion, on behalf of the Objector Hamlett Ranch Company, filed an Exception dated December 9, 1977 to the Proposed Order as issued on November 22, 1977 by the Hearing Examiner. It is further a matter of record that Mr. Zion chose not to file a supporting Brief, but requested that his briefs of March 24 and April 6, 1977 be reviewed and waived his right, by letter of December 30, 1977, to an oral argument before the Water Resources Division Administrator.

The Department did not receive any Exceptions to the Amended Proposed Order as issued on April 4, 1978, nor has there been a request for an oral argument hearing on a previously filed Exception. Therefore, since none of the parties in this matter specifically requested an oral argument hearing on the previously filed exception and briefs before the Administrator of the Water Resources Division, the Administrator hereby makes the following Final Order, based on the Hearing Examiner's Proposal for Decision of November 22, 1977 and Amended Proposal for Decision of April 4, 1978, the objections, exception, briefs, and all other information of record in the application file.

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on November 22, 1977 by the Hearing Examiner and the Amended Proposal for Decision as entered on April 4, 1978 by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and Order, except the Proposed Order is hereby modified; to reflect the changes (Condition 1, paragraph 2), requested by the Applicant; to add the clause ordered by the Amended Proposal for Decision as found on page 3 of said Order (Condition 6); and is further modified by adding new Condition 7.

FINAL ORDER

1. Subject to the conditions cited below the Applicant's Application for Change of Appropriation Water Right No. 8772-c41QJ by John E. Palo is hereby granted for the change of a portion of the following water right: A filed right by E. F. Watson, S. T. Arnold and Ed Mathews, filed March 25, 1885 and appropriated April 1, 1883 for 600 miners inches from Muddy Creek, as recorded in Book 1 of Water Rights, page 11, records of Lewis and Clark County, Montana. Of the above water 15 cubic feet per second or 6,735 gallons per minute up to 724 acre-feet per annum have been diverted from Muddy Creek at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, Township 19 North, Range 2 West, Montana Principal Meridian, Cascade County, Montana, and used for stock-watering and irrigation on a total of 300 acres, more or less in the N $\frac{1}{2}$ S $\frac{1}{2}$ of Section 13, and the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 13,

in Township 19 North, Range 2 West and the SW $\frac{1}{4}$ of Section 18 and the N $\frac{1}{2}$ of Section 19, in Township 19 North, Range 1 West, M.P.M., Cascade County, Montana, from February 18 to October 1, inclusive, of each year.

The authorized change grants 216 acre-feet per annum from the above 724 acre-feet per annum to be diverted from Muddy Creek at a rate of 500 gallons per minute or 1.11 cubic feet per second, at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, Township 19 North, Range 1 West, M.P.M., Cascade County, Montana, to be used for stock-watering and irrigation on a total of 90 acres, more or less, in the W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17, Township 19 North, Range 1 West, from April 1 to October 15, inclusive, of each year.

2. The issuance of this authorization to change appropriation water right in no way reduces the Applicant's liability for damage caused by the Applicant's exercise of this change in appropriation, nor does the Department in issuing this authorization to change, in any way acknowledge liability for damage caused by the Applicant's exercise of this authorization of change.

3. This authorization to change is subject to any final determination of prior existing water rights including the one in question in the sources as provided by Montana law.

4. This authorization to change shall be revoked upon the violation of any of the terms by the Applicant.

5. The authorization to change is subject to revision upon a finding that it would adversely affect any other water users. This revision shall be made if it is found that the water quality of Muddy Creek is diminished substantially by the exercise of this authorization to change. Thus, even though it appears that such a change would have little if any effect on the quality of the water of Muddy Creek, if at a later time it is found that the Applicant by the exercise of this authorization to change actually does substantially diminish the quality of water of Muddy Creek to the detriment of the downstream appropriators, this authorization shall be so modified to avoid such adverse effect.

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6. The Applicant shall, if leaching is done, leach before June 1 and if Muddy Creek waters are used for leaching it shall be limited to periods of high runoff when the salts are less than 1000 parts per million.

7. The above conditions to the granting of this authorization shall hold in full effect for any successor in interest to the Applicant herein named.

RECOMMENDATION

The Department recommends that all parties in this matter install and maintain adequate measuring devices to fit their particular individual situation, and keep a record of water used for their own proof of their water rights and use.

Done this 14th day of June, 1978.



Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION
FOR CHANGE OF APPROPRIATION
WATER RIGHT NO. 8772-G81QJ
BY JOHN E. PALO

AMENDED
PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the courtroom of the Cascade County Courthouse at Great Falls, Montana, on Friday, March 4, 1977, Gary L. Spaeth, Legal Counsel and Hearing Examiner for the Department of Natural Resources and Conservation, presiding.

Mr. John E. Palo, the Applicant herein, appeared personally and presented evidence and testimony in support of his application. The Applicant was represented by counsel, Mr. Donald J. Hamilton of the firm of Jardine, Stephenson, Blawie & Weaver of Great Falls, Montana.

There were two objections filed to the above application by Mr. and Mrs. Harry Wiegand of Sun River, Montana, and Mr. Bradley Hamlett, President of Hamlett Ranch Company. Mr. Hamlett was represented by counsel, Mr. James M. Zion, of Helena, Montana.

A Proposal for Decision was issued on November 22, 1977. The Hamlett Ranch Company filed exceptions to the Proposal for Decision dated December 3, 1977 with the Department on December 13, 1977.

Subsequently Mr. Philip Johnson on behalf of the Applicant, Mr. John Palo, submitted a letter requesting that the application and permit be

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modified. Mr. Johnson requested that the per annum consumption be reduced from 435 acre-feet to 216 acre-feet; that the proposed 942.9 gallons per minute be reduced to 500 gallons per minute; and the flow rate be reduced from 2.1 to 1.25 cfs; that the proposed point of diversion remain the same and that the acreage be reduced from 180 acres located in the NW₁ and the NE₁ S₄ to 90 acres, more or less, located in the W₁ NE₄, the E₁ NW₄, the NE₁ SW₄, the NW₁ SE₄ all in Section 17, T. 19 N., R. 1 W., N.P.M.

The reason given for the request was that additional water tests had been performed which indicated the salt content was too high to justify investing a large amount of money in irrigating the proposed ground without using a large amount of San River water for leaching. Mr. Johnson indicated that there are times of the year when Muddy Creek water is suitable for sprinkler irrigation.

The letter of Mr. Johnson was submitted to Mr. James Zion, Attorney for Hamlett Ranches, for his comments. Mr. Zion requested a copy of the test and reserved his right to demand a new hearing on the basis of the new information.

On January 30, 1978 Mr. Orrin Ferris, Administrator of the Water Resources Division remanded the hearing to resolve the problems created by the proposed change and the new information. By Order of the Hearing Examiner dated February 3, 1978, the Applicant was ordered to supply such information.

A pre-hearing conference was held on March 23, 1978 between Mr. Philip Johnson on behalf of the Applicant, Mr. James Zion, representing the exceptor, Hamlett Ranches, and the Hearing Examiner. Mr. Johnson presented the results of his tests which indicated there are times of the year when Muddy Creek water was extremely high in salts and probably should not be used in a

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sprinkler irrigation system. That the salt level in Muddy Creek was lowest during high water times and that if Muddy Creek water was used for leaching it should be done at this time. It was suggested that the Proposal for Decision be amended to so reflect this.

At the pre hearing conference and by a subsequent letter, Mr. Zion indicated that there was no need to go to a re-hearing and that the matter should be resubmitted to the Administrator for his consideration of the original exceptions filed by Hamlett Ranches.

Pursuant to the pre-hearing conference it is hereby ordered that the original Proposed Order be amended by adding the following clause:

"The Applicant, if leaching is done, shall leach before June 1 and if Muddy Creek waters are used for leaching it shall be limited to periods of high runoff when the salts are less than 1000 parts per million."

It is further ordered that the Proposed Order be amended to reflect the changes requested by the Applicant.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days after receipt of service of the Proposal for Decision upon parties herein. No extensions of time for filing exceptions will be granted. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 4 day of April 1978.

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Sam L. Smith
SAM L. SMITH
HEARING EXAMINER

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION)
FOR CHANGE OF APPROPRIATION)
WATER RIGHT NO. 8772-c41GJ)
BY JOHN E. PALO)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act, and to the Montana Administrative Procedures Act, after due notice, a hearing on objections to the above-described application was held in the courtroom of the Cascade County Courthouse at Great Falls, Montana, on Friday, March 4, 1977, Gary L. Spaeth, Legal Counsel and Hearing Examiner for the Department of Natural Resources and Conservation, presiding.

Mr. John E. Palo, the Applicant herein, appeared personally and presented evidence and testimony in support of his application. The Applicant was represented by counsel, Mr. Donald J. Hamilton of the firm of Jardine, Stephenson, Blewett & Weaver of Great Falls, Montana.

There were two objections filed to the above application by Mr. and Mrs. Harry Wiegand of Sun River, Montana, and Mr. Bradley Hamlett, President of Hamlett Ranch Company. Mr. Hamlett was represented by counsel, Mr. James W. Zion, of Helena, Montana.

Mr. Robert Peter and Mr. Silvio Rodriguez attended the hearing on behalf of the Department of Natural Resources.

At the commencement of the hearing, Mr. James Zion and

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Mr. Bradley Hamlett brought to the attention of the Hearing Examiner that Mr. Elwood Webb was not given notice of the hearing by registered mail. That Mr. Elwood Webb does have an interest in the waters of Muddy Creek, but Mr. Zion could not indicate as to whether Mr. Webb would have objected if he had received notice by registered mail.

The first witness for the Applicant was Mr. Philip E. Johnson. Mr. Johnson has been the Lessee of the Palo Ranch since 1971. Mr. Johnson is buying the land in question from Mr. Palo and is at present leasing that land proposed for irrigation. The original lease was written but Mr. Johnson now has a verbal year to year lease. Mr. Johnson is the son-in-law of the Applicant.

Mr. Johnson testified that they are presently and have in the past irrigated approximately 300 acres with the 600 miners inch water right which is in question. This water right was filed by E. P. Watson, S. T. Arnold and Ed Mathews in 1883 for 600 miners inches from Muddy Creek. Mr. Johnson has never nor does he know anyone else that has ever measured the water that they have diverted pursuant to this water right.

Under cross-examination Johnson indicated that the 724 acre-feet per annum indicated in the application was arrived at by multiplying 300 acres times 2.4 acre-feet. The 2.4 represents the amount of water needed per acre for each of the 300 acres that have been irrigated. The transfer request

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of 435 acre-feet per annum was based upon a flow rate of 2.1 cfs or 942.9 gallons per minute which is the size of the pump which the Applicant intends to install on Muddy Creek. The Applicant would irrigate approximately 180 acres by means of a rotary or circular sprinkler. That he would irrigate approximately 100 acres of the 300 acres that are presently being irrigated under this water right. It was indicated that the Applicant has later water rights from Muddy Creek which would be primarily flood water rights and the Applicant would use those water rights to irrigate the remainder of the 200 acres of the original 300.

Mr. Johnson indicated on Objectors' Exhibit B three present points of diversion from Muddy Creek. At point A, they presently irrigate land in Sections 13, 18, and 24 and at point C they irrigate land in Sections 18 and 19 which are to the south of Muddy Creek and are presently in irrigated grassland pasture. There is one reservoir on Muddy Creek which is at point D on Objectors' Exhibit B, which is just south-east of point C, and it has a 7 to 8 acre-foot capacity and is used for irrigation and stockwatering purposes. They water approximately 250 cow-calf units at that location. Point B on Objectors' Exhibit B was an old place of diversion and where there was a small reservoir but which has since washed out. Using these different points of diversion they have irrigated every year, particularly when there is sufficient water. Many times they do not have enough water to

irrigate from Muddy Creek from the middle of June on. Thus as a matter of practice they generally irrigate from March 1, till the waters of Muddy Creek run out.

Mr. Johnson further indicated that they would seek to supplement Muddy Creek water at their proposed new point of diversion by obtaining excess water from the Fort Shaw Irrigation District. This water is excess water and is not always available, and when it is available, it is generally only during the early spring runoff. Thus the Applicant would seek to use his excess water and store it in a reservoir which was not discussed in the application. He would release the water from this reservoir during times of need at the proposed new point of diversion. At present the Applicant, or Mr. Johnson have no agreement with the Fort Shaw Irrigation District to obtain excess water and even if there was an agreement to obtain excess water, there would be no guarantee that it would be available. The Applicant, as Mr. Johnson has indicated has water on Birdtail Creek, but this application in no way affects or changes the water right on Birdtail Creek.

Upon the completion of Mr. Philip Johnson's testimony, the Objectors then presented their case. At the beginning of the presentation, the Objector, Hamlett Ranch, moved to deny the application for failure of the Applicant to sustain his burden of showing that the proposed change of place of appropriation would not adversely affect others. This motion was taken under advisement and is hereby denied.

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Attached is a brief in support of such ruling and is incorporated herein by reference.

The Objector presented six witnesses: Mr. Earl Erickson, Department of Agriculture, Soil Conservation Service; Mr. Bradley Hamlett, President and stockholder of Hamlett Ranch Company; Mr. Harry Wiegand, an Objector; Mr. Bradley Hamlett, Jr., son of Mr. Hamlett, President of Hamlett Ranch Company; Mr. Lyle Thomas, Manager, Fort Shaw Irrigation District; and Mr. Robert J. Peter, Analyst, Water Rights Bureau, Department of Natural Resources and Conservation.

Mr. Earl Erickson testified regarding the slope and soil conditions of the proposed area's sprinkler use and gave his opinion as an expert that the proposed area had a potential saline seep problem. Mr. Erickson had not been on the Palo unit but reached his conclusions by examination of the SCS Soil Data Maps available to him. Mr. Erickson stated that the land in question was a gray area and before he could reach a definite conclusion that he would require a specific on-site investigation.

Mr. Erickson further indicated that the slopes on the tract of land proposed to be irrigated were primarily B and C slopes with some D slopes. That the majority of the land to be irrigated was B slope, which is 2 to 4 percent in grade, with approximately 60 acres being C slope, which is 4 to 6 percent in grade and there was approximately 5 percent of the area to be irrigated classified as slope D which is a slope of 8 to 12 percent in grade, which is considered to be

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rather steep. The soils north of Muddy Creek are 567B which are benz loam soils. The soils are affected by sodium with loamy surfaces that are both hard and massive and crusted under cultivation. Since such soil surveys are fairly broad, Mr. Erickson could not conclude as to the problems to be encountered, yet there could be a problem as to sodium. As to possible drainage problems, this is again a grey area, and since you are talking about benz series Mr. Erickson would want to make a further examination before concluding what problems there may be. Yet, the pH value is from 8.8 to 9.6 which indicates that you can assume that it would have limitations on intake rate into the soil even though there appears to be good drainage. Thus Mr. Erickson again under cross-examination would not conclude as to whether the land was suitable or not for irrigation. At no time did Mr. Erickson indicate that the runoff water would in any way affect the water quality of Muddy Creek.

Mr. Hamlett testified that he has been a rancher for all of his 59 years, and that he was very familiar with irrigation practices. He indicated that he has been a co-owner of the Hamlett Ranch since 1951, and prior to that time had a ranch in the Cascade area.

Mr. Hamlett stated that he was familiar with the Palo Ranch and the use of water on the ranch, and that he had frequent occasion to view the 300 acres that are supposedly being irrigated at the present time. Mr. Hamlett testified that he is a pilot and frequently flies over the area. Based upon those observations, Mr. Hamlett testified that since

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1951 he has seen very little irrigation on the Palo Ranch.

Mr. Hamlett testified regarding saline seep problems and noted on similar land there has been saline seep for crops similar to those proposed to be grown by the Applicant. Mr. Hamlett said that the land he had saline problems with, had about the same slope and character as the proposed area to be irrigated under this application.

Mr. Hamlett testified that he objected to the Palo application because in fact it was an attempt to obtain all of the water that has been used in the past, and such an attempt would reduce the amounts of water that he and others actually used over the years. Mr. Hamlett testified that he felt, as an expert in ranching and irrigation, that saline seep on the Palo Ranch would affect the Hamlett ranch.

Mr. Hamlett further testified that he feels that he has one of the earliest, if not the earliest, water right on Muddy Creek and since this application for change is upstream from his ranch, that a grant of this change of application would adversely affect his present use of the water of Muddy Creek by decreasing the amount of water available in the stream. Mr. Hamlett further indicated that he is concerned about the availability of Fort Shaw water and that even when Fort Shaw water is not available, and there is very little water in Muddy Creek, the Applicants will continue to divert water from Muddy Creek to irrigate under this proposal even though this would and possibly no water would reach the

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Hamlett ranch. At present the Hamlett ranch irrigates approximately 570 acres of grassland pasture from Muddy Creek and waters approximately 200 cow-calf units. That the irrigation system on the Hamlett ranch needs water at least through May and June, and many years the runoff from Muddy Creek ceases toward the end of April. Muddy Creek flows during the early spring runoff during most years, and during periods of rain. During other periods.

Mr. Harry Wiegand testified on behalf of Hamlett ranch in his objection. Mr. Wiegand is immediately downstream on Muddy Creek from the Hamlett Ranch which is approximately 2 miles from the Palo property. He is somewhat familiar with the ranching operations of the Palos and has been a rancher and farmer in the Cascade area for some time. Through Mr. Wiegand's testimony the Objector, Hamlett Ranch Company, introduced Exhibit H which is a photocopy from Mr. Wiegand's abstract, this exhibit was received without objection. This exhibit indicated that approximately 1/3 of the 600 miners inch water right in question had been conveyed by Edward A. Mathews to Jerre Sullivan. This seemed to indicate that the water right in question was not 600 miners inches but was rather 400 miners inches.

Mr. Wiegand also indicated that from his abstract that he had a 1905 filing for 5 miners inches and that he has a water right on St. John's Creek as well as some of the other dry coulees on his ranch. That he uses the water of Muddy

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Creek for stockwatering and some irrigation and is primarily concerned with availability even though saline seep would possibly cause a water quality problem for him. Mr. Wiegand, during cross-examination, indicated that he had no idea as to the amount of water that the Palo's have used.

Mr. Wiegand indicated that Muddy Creek runs from a trickle to a full size river. That in dry years it takes a while for water to travel down Muddy Creek and since his ranch is further downstream, he is somewhat concerned by anything that would affect the creek as it is at the present.

Mr. Hamlett, Jr. testified that he is the son of Mr. Bradley Hamlett, President of the Hamlett Ranch. Mr. Hamlett testified that he worked on the Hamlett Ranch during the summers while he was going to school and that he has lived there on the Ranch full time since 1971. During this time he could see the proposed area of irrigation and the 300 acres which the Applicant claims has been irrigated. He saw noticeable irrigation during the flood season but did not ever in the past see any man-caused irrigation. That he had frequent occasion to observe the land in question and the land could be seen from a top square butte, where the Hamlett Ranch Company runs cattle in the summer.

Mr. Lyle Thomas, Manager, Port Shaw Irrigation District, testified that there were four categories of water available to members and non-members of the Port Shaw Irrigation District:

- a) "Assessed Water Use:" is water available only to

members on a contract basis. A small part of this water is available to a small part of the Palo Ranch.

b) "Excess water:" is water which runs off when assessed water is used, and there might be small quantities of excess water available for the irrigation project in question.

c) "Surplus water:" is water which is left over after the needs of the assessed users, and may be sold to anyone on a first come first serve basis and is available in approximately 2 years out of the three, at least as far as Mr. Thomas's experience has been.

d) "Waste water:" is water which runs off after use by all others.

The general conclusions of Mr. Thomas's testimony is that any water from the irrigation district would be unpredictable, sporadic, and subject to by others. Mr. Thomas indicated that surplus water would be available for at least two years out of three and felt it would be worth the chance to put in a system based upon the availability of this water. Mr. Thomas's testimony seemed to establish that there could be a great temptation to use Muddy Creek water if there was no other water available such as that from the irrigation district.

Mr. Robert J. Peter of the Department was called by the Objectors to testify as to his field investigation of the Palo application. Mr. Peter testified that from his field

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investigation, based upon an examination of the grass growth in the area presently claimed to be irrigated by the Palos, that irrigation had indeed been accomplished in the past.

As to the 721 acre-feet per year, Mr. Peter indicated that the figure had been reached on a recommended use of 2.4 acre-feet per acre for 300 acres of land which the Applicant claimed had been irrigated. Mr. Peter admitted that the volume figure was not based on any actual volume measurement.

At the conclusion of the Objectors presentation, Mr. Silvio Rodriguez of the Department testified on behalf of the Department. He stated the figure for the "past use" of 724 acre-feet was reached by estimating 2.4 acre-feet per acre for the soil classification of the land claimed to be irrigated by the Applicant. He said that 600 miners inches could be used to irrigate 300 acres but normally an average of 1 miners inch per acre, and thus 300 miners inches would appear to be sufficient to irrigate the 300 acres in question. Mr. Rodriguez further indicated that it was doubtful that 15 cfs was ever used by the Palos.

There were four witnesses present on behalf of the Applicants' case. Mr. John Palo testified that he had been on his present land since 1929 and claimed that he had irrigated the 300 acres every year, diverting the water by means of a headgate and that there had indeed been flood irrigation in the early spring of the year. He further indicated that he had no idea as to the volume of water

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actually used on the Palo Ranch.

Mrs. Gorick was called to testify regarding prior water use on the Palo Ranch. Her father had owned the Palo Ranch before its sale to Mr. Palo in 1928. She testified that she had seen her father irrigate the land when she was a little girl. That this would date her recollection back to the early 1920's and that her father probably irrigated up to 1927 or 1927 when he died. While she was not familiar with the actual areas irrigated or the points of diversion, she was familiar with an old headgate which her grandfather had used on the property. This headgate as far as she could remember had not been used by her father in the 1920's.

Mr. Fred Taylor testified that he was a friend of Mr. Palo and that he had seen Mr. Palo irrigate on some of his visits to the Palo Ranch. Mr. Taylor was not familiar as to the volumes used nor the exact location of the land being irrigated.

An affidavit by Mr. Gray Lolman was submitted by the Applicant. Mr. Lolman indicated that Mr. Palo used water out of the Muddy Creek during the years 1954-1961 when he worked as a foreman on the Seaton Ranch. That the reason why such affidavit was submitted was that Mr. Lolman was unable to attend the hearing because of health reasons.

The final witness on behalf of the Applicant was Mr. Dale Henry. Mr. Henry graduated in Agricultural Engineering from MSU in 1976. He is presently employed by Montana Testing Laboratories and was retained by Mr. Johnson to assist in determining the economic feasibility of the pro-

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posed project. On three different occasions, Mr. Henry or individuals under his supervision, took soil samples of the area proposed to be irrigated. The first soil samples indicated there was no problem, that there was only sand below two feet and the sorts were clean of salt and sodium. But there was mud and shale below 30 inches in certain locations. The second examination indicated that there was no salts in the first six inches and from six inches to six feet there was five minimals per centimeter which does not pose a major problem to any irrigation in the area. The third examination was conducted as a result of the differences in the first two examinations. This time Mr. Henry took three profiles of the area to be irrigated. (One profile was taken at a point of a tall percent slope where there were an indicate shale below 30 inches.) Two other profiles taken at this time showed that there was a clay loam to 11½ feet and the other location showed a water table at 9 feet. Soils were clean to 20 to 30 inches with sodium mineral below that point. There was no permeability problem to 11½ feet. There are some pans in the area of approximately 10 feet in diameter, but that this would pose very little problem. With some leaching being required, this whole area could be cropped with very little problem. The irrigation should avoid as much as possible the mud and shale area.

Mr. Henry indicated that contrary to the soil classification referred to by Mr. Erickson that this isn't a typical benz soil. The PH is lower here than what would be found in a benz area as was testified to by Mr. Erickson.

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Under cross examination, Mr. Henry testified that the sites selected for the soil samples were not necessarily the best soils in the area. Mr. Henry pointed out that at the time they were employed by the applicant to conduct the tests that they were looking at the feasibility of irrigation and not preparing for the present hearing. That in no way did they seek information that would slant their conclusions in favor of the proposal by Mr. Johnson, but rather they wanted as good as evidence as possible in reaching their feasibility determination.

Mr. Henry felt that with the crops proposed by Mr. Johnson, which is one year of barley followed by alfalfa and grassland pasture, that this would cause very little problem. Because of the present range condition, that actually this cropping and irrigation practice may actually decrease the erosion from the land in question.

Mr. Henry, during his testimony, relied upon notes and charts summarizing the soil information which had been collected. Further, that the soil classifications were sketched on a small map with the center pivot located on the map. The Objector indicated that the soil classified as 126 on this exhibit had a high degree of salinity and that this soil was found within the area of the sprinkler and immediately adjacent to the sprinkler area. This must be the same soil as was referred to by Mr. Erickson because it composes approximately 5% of the proposed area to be sprinkled.

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As required by law, the Hearings Examiner makes the following proposed findings a fact, the proposed conclusions of law and proposed order to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation.

PROPOSED FINDINGS OF FACTS:

1. On June 30, 1976 the Department received an Application for Change of Appropriation Water Right No. 8772-c41QJ by John E. Palo seeking to change a portion of the following water right: A filed right by E.F. Watson, S.T. Arnold, and Ed Mathews, filed March 25, 1885 and appropriated April 1, 1883 for 600 miners inches from Muddy Creek, as recorded in Book 1 of Water Rights, page 11, records of Lewis and Clark County, Montana. Of the above water right, 15 cfs on 6,735 gpm up to 724 acre-feet per annum have been diverted from Muddy Creek at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, Township 19 North, Range 2 West, M.P.M., Cascade County, Montana, and used for stock watering and irrigation on a total of 300 acres, more or less, in the N $\frac{1}{4}$ S $\frac{1}{4}$ of Section 13, and the S $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, in Township 19 North, Range 2 West, and the SW $\frac{1}{4}$ of Section 18 and the N $\frac{1}{4}$ of Section 19 in Township 19 North, Range 1 West, M.P.M., Cascade County, Montana, from February 15 to October 1, inclusive, of each year.

A proposed change is to transfer 435 acre-feet of water from the above 724 acre-feet per annum, to be diverted from Muddy Creek at a rate of 2.1 cfs or 942.9 gpm at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, Township 19 North, Range 1 West,

N.P.M., Cascade County, Montana to be used for stock watering and irrigation on a total of 180 acres, more or less, in the NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ of Section 17, Township 19 North, Range 1 West, from April 1 to October 15, inclusive, of each year.

2. Timely objections to the above described application were received from Mr. Bradley Hamlett, President of Hamlett Ranch Company and Mrs. Harry Wiegand. The objectors pledged that they would be adversely affected by the granting of this change in appropriation. That such change would effect them by reducing the water available to them and by such new irrigation that it would decrease the quality of water available to them by increasing the salts and sodiums.

3. Applicant does have a filed water right to 600 miners inches of water from Muddy Creek appropriated April 1, 1883 by E.F. Watson, S.T. Arnold, and Ed Mathews. The Applicant was the successor in interest to such water rights by way of conveyance and in particular is the successor to 200 miners inches of that water by being the successor in interest to a Margaret McCartney, who was the eventual successor to Katie Getts who was the successor in interest to an S.V. Getts who was the recipient of a conveyance by Mr. Sullivan as indicated in objectors Exhibit H.

4. While the use of Muddy Creek water by Mr. Paio and his lessee, Mr. Phillip Johnson, has been somewhat sporadic over the last few years. There is every indication that the 300 acres in question has been irrigated in the past.

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That such water has not been abandoned by any of the parties. Such use of Muddy Creek water by way of testimony dates back at least to the early 1920s.

5. The Applicant by way of this change seeks to irrigate approximately 180 acres by way of a center pivot sprinkler system with a pumping capacity of 2.1 cfs or 942.9 gpm. That under this particular water right, the Applicant or his lessee, Mr. Phillip Johnson, would also seek to continue to irrigate approximately 100 acres of the 300 acres that were in the past irrigated. It is doubtful whether at any one time 15 cfs was diverted to irrigate the 300 acres that had previously been irrigated except possibly during periods of high flood. For purposes of this decision the 15 cfs is not an important criteria, but rather, the 2.1 cfs is of prime importance. The total bottom flow remaining at the old point of diversion are not necessary in reaching this decision because they are primarily dealing with quantifying an old existing water right. Thus this is not the proper forum for determining the total available flow under the water right in question. Rather, by this decision it is determined that the volume proposed to be transferred (2.1 cfs) is a reasonable volume flow under the existing water right in that there is volume flow in excess of this 2.1 cfs under the old existing water right which can be used at the present points of diversion but which by this decision need not and are not necessarily quantified.

6. The Hamlett Ranch Company and Mr. Harry Wiegand have

apparent water rights in Muddy Creek. It also appears from the record that such water rights are subsequent to the Applicant's right, but for purposes in reaching this decision, this is not important. The important conclusion here is, that the Applicant, Mr. John Palo, does have a water right to irrigate approximately 300 acres of water from Muddy Creek. Thus this decision has taken into consideration whether this change would have an adverse effect upon the objectors, Mr. Hamlett and Mr. Niegand, even if (1) they are subsequent in time, and (2) they are prior in time. Under both criteria this change would have no present adverse effect upon the objectors. The two criteria which were raised by the objectors hereby which they could possibly have been adversely effected are (1) there is less water available to them and (2) the quality of water could be diminished due to the addition of salts and sodium from the new irrigation. Actually, by converting from a flood irrigation system on 300 acres to a sprinkler irrigation system on a 180 acres and flood irrigation on 100 acres, there actually will be less burden placed upon Muddy Creek by this particular change than under the use made previously of this right. As to water quality, there is no indication in the record that a sprinkler system would adversely affect the quality of water downstream from the proposed place of use. (Actually, because of the efficiency of a sprinkler system, there is every indication that the water quality would in essence be, if not improved by this change from flood irrigation to sprinkler system would in no event be diminished.

There is just very little run off associated with a sprinkler system and thus there could be very little return flow which would cause any diminishing in water quality in Muddy Creek. According to Mr. Henry, there may be times when leaching would be required and if such leaching is scheduled to coincide during periods of high runoff, it would have very little if negligible impact upon water quality in Muddy Creek downstream from the proposed point of view.

7. Pursuant to Section 89-893, R.C.M. 1947, an appropriator along Muddy Creek may not change all or any part of an appropriation from the land of which it is pertinent and transfer it to another location without the approval of the Department.

8. If this change in appropriation is granted without modification, it may adversely affect the rights of other appropriators along Muddy Creek.

From the foregoing proposed findings of fact, the following proposed conclusions of Law are hereby made:

PROPOSED CONCLUSION OF LAW

1. Under the provisions of Section 89-892, R.C.M. 1947, an authorization from the Department is required to change the location of the point of diversion and place of use along Muddy Creek.

2. If this authorization is conditioned it will not adversely affect any other appropriator.

3. The filed and "use" rights of other appropriators must, by statute, be protected even if they are subsequent to

the right in question.

4. The objectors presenting evidence at the hearing appear to have valid filed and "use" rights along Muddy Creek.

6. The application for change of appropriation water rights should be granted according to provisions of Chapter 8, Title 89, R.C.M. 1947.

7. Nothing herein has bearing upon the status of water rights claimed by the applicant including the one sought to be changed, nor does anything herein have bearing upon the status of claimed rights of any other party, except in relation to the right in question, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact, and proposed conclusions of Law, the following proposed order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's request to change appropriation water right is hereby granted for the change of a portion of the following water right: A filed right by E.F. Watson, S. T. Arnold and Ed Mathews, filed March 25, 1885 and appropriated April 1, 1883 for 600 miners inches from Muddy Creek, as recorded in Book 1 of Water Rights, page 11, records of Lewis and Clark County, Montana. Of the above water 15 cfs or 6,735 gpm up to 724 acre-feet per annum have been diverted from Muddy Creek at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, Township 19 North, Range 2 West, Montana Principal Meridian, Cascade County, Montana, and used for stock watering and irrigation on a total of 300 acres more

or less in the $N\frac{1}{2}S\frac{1}{2}$ of Section 13, and the $S\frac{1}{2}NW\frac{1}{2}$ of Section 13, in Township 19 North, Range 1 West and the $SW\frac{1}{4}$ of Section 18 and the $N\frac{1}{2}$ of Section 19, in Township 19 North, Range 1 West, M.P.M., Cascade County, Montana, from February 18 to October 1, inclusive, of each year.

The proposed change is to transfer 435 acre-feet per annum from the above 724 acre-feet per annum to be diverted from Muddy Creek at a rate of 2.1 cfs or 942.9 gpm, at a point in the $SW\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$ of Section 17, Township 19 North, Range 1 West, M.P.M., Cascade County, Montana, to be used for stock watering and irrigation of a total of 180 acres, more or less, in the $NW\frac{1}{4}$ and the $N\frac{1}{2}S\frac{1}{2}$ of Section 17, Township 19 North, Range 1 West, from April 1 to October 15, inclusive, of each year.

2. The issuing of this authorization to change appropriation water right in no way reduces the Applicant's liability for damaged caused by the Applicant's exercise of this change in appropriation, nor does the Department in issuing this authorization to change, in any way acknowledge liability for damage caused by the Applicant's exercise of this authorization of change.

3. This authorization to change is subject to any final determination or prior existing water rights including the one in question in the sources as provided by Montana Law.

4. This authorization to change shall be revoked upon the violation of any of the terms by the Applicant.


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6. Authorization to change is subject to revision upon a finding that it would adversely affect any other water users. This revision shall be made if it is found that the water quality of the Muddy Creek is diminished substantial by the exercise of this authorization to change. Thus, even though it appears that such a change would have little if any effect on the quality of the water of Muddy Creek, if at a later time it is found that the Applicant by the exercise of this authorization to change actually does substantially diminish the quality of water of Muddy Creek to the detriment of the downstream appropriators, this authorization shall be so modified to avoid such adverse affect.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be mailed to the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 22 day of November, 1977.


GARY L. SPETH
Hearing Examiner

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